

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-01/11

Date: 10 June 2014

Date of public redacted version: 11 December 2017

TRIAL CHAMBER V(A)

Before: Judge, Chile Eboe-Osuji, Presiding
Judge Olga Herrera Carbuca
Judge Robert Fremr

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. WILLIAM SAMOEI RUTO and JOSHUA ARAP SANG

Public redacted version of
Provisional Direction on the Prosecution's Request for Guidance on Disclosure
Relating to P-0534

Decision to be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Anton Steynberg

Counsel for William Samoei Ruto

Counsel for Joshua Arap Sang

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Ms Natacha Schauder ad interim

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber V(A) (the ‘Chamber’) of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, having regard to Articles 54(3)(f), 67(2) and 68 of the Rome Statute (the ‘Statute’) and Rules 77 and 81(4) of the Rules of Procedure and Evidence (the ‘Rules’), issues, by majority, Judge Eboe-Osuji partly dissenting, this ‘Provisional Direction on the Prosecution’s Request for Guidance on Disclosure Relating to P-0534’.

1. On 5 June 2014, the Office of the Prosecutor (‘Prosecution’) filed a request (the ‘Request’) related to former Prosecution Witness 534 (‘Former Witness 534’).¹ The Prosecution submits that Former Witness 534 provided potentially exonerating information, but ultimately refused to consent to the disclosure of his identity to the defence teams for Mr Ruto and Mr Sang (the ‘Defence’) and to be externally relocated, which the Victims and Witnesses Unit (the ‘VWU’) deems necessary to protect his safety and security if his identity is disclosed.² The Prosecution confirms that Former Witness 534 is the source of hearsay evidence to be provided by [REDACTED].³
2. The Prosecution submits that this situation ‘creates problems of compliance with either its duties under Article 67(2) and Rule 77, on the one hand, or with those found in Articles 68 and 54(3)(f) and Rule 81(4) on the other’.⁴ The Prosecution seeks guidance from the Chamber as how to best proceed in the circumstances and suggests that an *ex parte*, Prosecution and VWU only, status conference be urgently convened in the event that the Chamber requires more information in order to make a decision on this matter.⁵

¹ ICC-01/09-01/11-1343-Conf-Exp (with three confidential *ex parte* annexes).

² ICC-01/09-01/11-1343-Conf-Exp, para. 2.

³ ICC-01/09-01/11-1343-Conf-Exp, para. 14.

⁴ ICC-01/09-01/11-1343-Conf-Exp, para. 21.

⁵ ICC-01/09-01/11-1343-Conf-Exp, para. 25.

3. As described by Trial Chamber I, a 'dual problem' is created in cases where there is tension between 'the need to ensure that all relevant exculpatory evidence is served on the accused and the need to ensure that victims and witnesses are properly protected'.⁶ The Chamber finds that such a situation arises in the present case.⁷
4. The Chamber considers that it is possible to resolve this matter without the need of an *ex parte* hearing and sets out the following provisional direction for how to proceed:
 - (i) For Former Witness 534's two interviews and [REDACTED] statements (the 'Relevant Materials'), the only redactions allowed are for pre-approved categories of the Redaction Protocol⁸ and the identity of the subjects of any investigation pursuant to Article 70 of the Statute. As a further direction by majority, Judge Eboe-Osuji dissenting, the identity of Former Witness 534 must be disclosed to the Defence.
 - (ii) The VWU is to immediately inform Former Witness 534 of the pending disclosure and take any appropriate protective measures which the witness agrees can be implemented. The Prosecution is to arrange with the VWU for this consultation to occur prior to the disclosure of Former Witness 534's identity to the Defence.

⁶ Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on Disclosure Issues, Responsibilities for Protective Measures and other Procedural Matters, 8 May 2008, ICC-01/04-01/06-1311-Anx2, para. 97 (originally notified on 24 April 2008).

⁷ Compare Article 67(2) of the Statute and Rule 77 of the Rules with Article 54(3)(f) of the Statute, Article 68(1) of the Statute and Rule 81(4) of the Rules.

⁸ Annex of 'Decision on the protocol establishing a redaction regime', 27 September 2012, ICC-01/09-01/11-458-AnxA-Corr.

- (iii) The Prosecution is to identify to the Defence and Chamber: (a) all portions of the Relevant Materials falling under Article 67(2) of the Statute and (b) all portions of the disclosed materials which constitute the hearsay evidence provided by [REDACTED] for which Former Witness 534 is the only source.

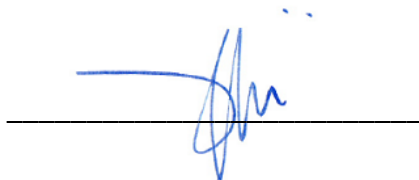
5. If the Prosecution or VWU have any compelling reason as to why the direction should not be implemented, they are to make submissions to the Chamber immediately. If no such submissions are made, or if the Chamber does not consider the submissions made to provide any compelling reason for amending the provisional direction, the Chamber will reissue this provisional direction in final form, notified also to the Defence.

FOR THE FOREGOING REASONS, THE CHAMBER, BY MAJORITY, HEREBY

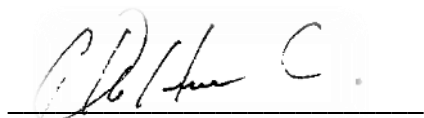
DIRECTS the Prosecution and VWU to file submissions, if any, as indicated in paragraph 5 above within one day of notification of the present decision.

Judge Eboe-Osuji appends a partly dissenting opinion.

Done in both English and French, the English version being authoritative.

A blue ink signature, appearing to be 'Chile Eboe-Osuji', written over a horizontal line.

Judge Chile Eboe-Osuji, Presiding Judge

A black ink signature, appearing to be 'Olga Herrera Carbuccion', written over a horizontal line.

Judge Olga Herrera Carbuccion

A black ink signature, appearing to be 'Robert Fremr', written over a horizontal line.

Judge Robert Fremr

Dated 10 June 2014

At The Hague, The Netherlands